

D.P.U. 92-130

Petition of Boston Edison Company to waive the requirements of 220 C.M.R. §§ 8.00 et seq. and defer any further activities regarding the Company's third request for proposals for the purchase of electricity from non-utility generators.

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## I. INTRODUCTION

### A. Procedural History

On May 20, 1992, Boston Edison Company ("BECo" or "Company") filed with the Department of Public Utilities ("Department") a petition ("Petition") requesting that the Department defer to the Company's integrated resource management ("IRM") filing<sup>1</sup> any further activities regarding BECo's third request for proposals for the purchase of electricity from non-utility generators ("RFP 3"). As part of its Petition, BECo requested that the Department stay the requirement that the Company identify, on June 1, 1992, the Award Group in RFP 3. BECo also filed a memorandum in support of its petition ("BECo Memorandum"). In support of its request, BECo claims that there is no need for the power available from RFP 3 and that entering into a contract for power from RFP 3 would result in unnecessary costs to ratepayers.

The Attorney General of the Commonwealth ("Attorney General") intervened pursuant to G.L. c. 12, § 11E. Also, the following parties were granted intervenor status in this proceeding: the Coalition of Non-Utility Generators, Inc. ("CONUG"); DLS Energy, Inc.; Eastern Edison Company; the Energy Consortium; West Lynn Cogeneration ("West Lynn"); the Massachusetts Public Interest Research Group; KES Fitchburg, L.P. and KES Webster, L.P.; the New England Cogeneration Association ("NECA"); CMS Generation Company; the

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<sup>1</sup> BECo's Petition anticipated a filing in the Company's first IRM proceeding. On December 2, 1992, the Company submitted its draft initial filing in its first IRM proceeding. On April 28, 1993, the Department approved a settlement of the issues in that proceeding. Boston Edison Company, D.P.U. 92-265 (1993). However, the settlement did not address the need for the power available from RFP 3. In accordance with the settlement, BECo will make its second IRM filing on March 15, 1994. Id. at 6. BECo's second IRM filing will include RFPs for supply-side and demand-side resources. Id.

Conservation Law Foundation, Inc.; Altresco Financial, Inc. ("Altresco"); and United Power Systems, Inc.

On May 27, 1992, NECA filed a preliminary response to BECo's petition ("NECA Opposition"). Also, on May 27, 1992, CONUG filed (1) an opposition to BECo's petition, (2) an opposition to BECo's request for a stay, (3) a motion to dismiss, (4) a motion for summary judgment, and (5) a memorandum in support of its associated pleadings ("CONUG Memorandum").

On May 28, 1992, BECo filed a limited reply to the oppositions of CONUG and NECA ("BECo Response"). On May 29, 1992, CONUG filed a response to BECo's limited reply. The CONUG response included a proposal that the Department direct BECo to identify the Award Group and negotiate with Award Group members, but not require BECo to execute contracts with the Award Group members until final disposition of the issues in this case.

On May 29, 1992, BECo filed a letter expressing an agreement with CONUG regarding the announcement of an Award Group for RFP 3.

On June 1, 1992, the Department orally notified the Company of the Department's decision (1) to require BECo to announce the RFP 3 Award Group on June 1, 1992 and (2) to stay BECo's obligation to contract with the Award Group. Accordingly, on June 1, 1992, BECo announced the ranking of the project proposals in RFP 3 and identified Altresco Lynn as the sole member of the Award Group (see June 1, 1992 letter with attached "RFP 3 - Final Public Summary" from Scott M. Albert of BECo to the Department).<sup>2</sup> On June 2, 1992, the

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<sup>2</sup> Forty projects proposals were submitted to BECo in response to RFP 3. The proposed Altresco Lynn project is sponsored by Altresco Financial, Inc.

Department followed its oral notification to the Company with an Interim Order (1) denying BECo's originally requested stay and (2) granting a stay until July 15, 1992 of the requirement under 220 C.M.R. § 8.05(6)(a), that BECo immediately begin the process of negotiating and executing a contract with the RFP 3 Award Group. Boston Edison Company, D.P.U. 92-130-1 (1992). In that Interim Order, the Department stated that "if the Department has not ruled on BECo's underlying petition in this case [deferral of RFP 3 to IRM] by July 15, 1992, such stay shall expire and the Department's Orders and regulations governing BECo's RFP 3 shall be in effect." Id. at 11.

On June 10, 1992, West Lynn filed a Memorandum in Support of its Opposition to Boston Edison Company's Petition to Waive the Requirements of 220 C.M.R. 8.00 and Defer Proceedings in RFP #3 (West Lynn Memorandum).

Between June 5, 1992 and July 3, 1992, each of six sponsors of project proposals in RFP 3 filed with the Department petitions complaining of unreasonable actions by BECo in its ranking of project proposals in RFP 3 (see Section II.B., below).

On July 8, 1992, West Lynn filed a Motion For Extension of Stay, requesting an extension by 45 days of the Department's stay in D.P.U. 92-130-1 ("West Lynn Motion for Stay"). On July 9, 1992, CONUG filed a response to the West Lynn Motion for Stay. CONUG opposed a stay of the requirement that BECo negotiate with the RFP 3 Award Group, but CONUG supported a stay of the requirement that BECo execute a contract with the Award Group. On July 13, 1992, BECo filed a response to the West Lynn Motion for Stay, supporting West Lynn's request.

On July 15, 1992, the two Commissioners who were deciding this case<sup>3</sup> issued a letter stating that they were unable to agree on a decision on BECo's petition for deferral of RFP or on a decision on any further stay. By that letter, the Commissioners informed BECo of its obligation, with the expiration of the stay issued on June 2, 1992, to begin the process of negotiating and executing a contract with the RFP 3 Award Group.<sup>4</sup>

On July 17, 1992, BECo filed a "Motion for Decision by the Full Commission and For Immediate Stay." By this motion, BECo requested that the full Commission consider and grant BECo's petition to defer RFP 3. BECo also requested that the Department consider granting a stay of the Company's obligation to negotiate and execute a contract with the RFP 3 Award Group. On July 20, 1992, CONUG filed a response opposing BECo's request for a stay of the requirement to negotiate a contract with the Award Group. Also on July 20, 1992, Altresco filed a statement in support of CONUG's petition.

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<sup>3</sup> On April 1, 1991, Robert C. Yardley, Jr., Chairman of the Department, issued a notice of recusal from any part in the deliberations or decisions regarding either BECo's proposed Edgar generating station or BECo's RFP 3. Chairman Yardley's recusal was based on a potential conflict of interest arising out his previous employment where he performed consulting work for BECo concerning its proposed Edgar project. Chairman Yardley determined that issues regarding BECo's proposed Edgar project may arise in the Department's review of BECo's RFP 3 and, thus, he did not participate in decisions regarding RFP 3. See Boston Edison Company, D.P.U. 90-270, at 1, n.1 (1991).

<sup>4</sup> Also on July 15, 1992, Chairman Yardley issued a notice that henceforth he would participate in the deliberations and decisions in this case and any other cases pertaining to BECo's RFP 3. He determined that there was no longer a potential conflict of interest in matters involving RFP 3 based on (i) BECo's decision to defer the construction of its proposed Edgar station and (ii) the Department's granting of BECo's motions to withdraw its petitions in three proceedings before the Department relating to the proposed Edgar facility.

On July 24, 1992, BECo filed with the Supreme Judicial Court for Suffolk County an action against the Department and the three named Commissioners of the Department, including: (1) a petition of appeal of the Department's June 2, 1992 Interim Order (D.P.U. 92-130-1); (2) a motion for stay; and (3) a memorandum in support of its motion for stay. By this motion, BECo requested that the Department's June 2, 1992 Interim Order

be stayed so as to relieve the Petitioner [BECo] of the obligation to negotiate and execute contracts for the purchase of capacity under RFP 3, and that the Department of Public Utilities be enjoined from taking any action or enforcing any order in contravention of the relief herein prayed for, pending a final determination of this Appeal (Motion for Stay at 5).

On August 4, 1992, the Department issued a stay suspending BECo's obligation to negotiate and execute a contract with the RFP 3 Award Group until seven days after the Department issues a final decision on BECo's Petition to defer its RFP 3. Boston Edison Company, D.P.U. 92-130-2 (1992). On August 5, 1992, BECo withdrew its action at the Supreme Judicial Court.

On November 9, 1992, in response to findings made by the Department in D.P.U. 92-92,<sup>5</sup> CONUG filed (1) "Motion for Leave to Submit Supplement to Memorandum In Support of Motion for Summary Judgment" ("CONUG Motion to Supplement") and (2) Supplement to Memorandum In Support of Motion for Summary Judgment ("CONUG Supplemental

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<sup>5</sup> BECo's most recent base rate proceeding was docketed as D.P.U. 92-92; the Department issued an Order on October 30, 1992. In determining the appropriate rate design for the implementation of BECo's new rates, the Department directed the Company to use historical performance data regarding its generating units in the Company's assessment of the year-of-need in its marginal cost study. Boston Edison Company, D.P.U. 92-92, at 27-28 (1992). Based on the Company's historical performance data, the Department identified 1994 as the Company's year of need for capacity additions. Id. at 27, n.11.



Memorandum"). On November 13, 1992, Altresco filed a letter in support of the position presented in the CONUG Supplemental Memorandum. On November 13, 1992, the hearing officer granted the CONUG Motion to Supplement and set December 4, 1992 as the deadline for parties to respond to the CONUG Supplemental Memorandum. Responses were filed by West Lynn on November 18, 1992, by United Power System, Inc. on November 23, 1992, and by BECo on December 4, 1992. On December 9, 1992, CONUG filed a reply letter.

On June 25, 1993, BECo filed (1) a Motion to Reopen the Record, (2) a Memorandum in Support of Motion to Reopen the Record, and (3) the Affidavit of James J. Judge, director of corporate planning and assistant treasurer of the Company ("Judge Affidavit"). BECo asserts that good cause exists for reopening of the record because, since the record has closed, there have been substantial changes in the economy and the market for power (Motion to Reopen the Record, ¶ 4). BECo argues that as a consequence of these changes, the execution of a contract with the RFP 3 Award Group would impose unnecessary costs on the Company's ratepayers and would not be in the public interest (*id.*). BECo argues that since the time that information last was provided to the Department in this proceeding (1) the cost of power has declined dramatically, and (2) the economy has continued to decline (Memorandum In Support of Motion to Reopen the Record at 3-4; Judge Affidavit ¶¶ 4, 5, 6).

#### B. Background On RFP 3

On October 11, 1991, BECo issued RFP 3, after approval by the Department on October 9, 1991. Boston Edison Company, D.P.U. 90-270-B at 1 (1992). BECo's approved RFP 3 resulted from a comprehensive review of BECo's proposed RFP that included consideration of

comments from 13 parties (in addition to BECo) on such issues as (1) the definition of an independent power producer ("IPP"), (2) the resource plan and supply block calculation, (3) environmental externality values, (4) determining avoided emissions, (5) net emissions, (6) verification procedures, (7) threshold criteria, and (8) the scoring system. Boston Edison Company, D.P.U. 90-270 (1991).

Early in the RFP 3 proceeding, BECo filed a motion to defer action on the issuance of its RFP 3 until the Energy Facilities Siting Council ("Siting Council") issued its decision in docket EFSC 90-12/12A on BECo's proposed Edgar project (see Section II.A., below). Boston Edison Company, D.P.U. 90-270, at 4 (1991). While the Department agreed with the Company on the need for consistency between the Siting Council's decision and the Department's decision on RFP 3, the Department found that the prompt issuance of RFP 3 would better promote least-cost planning by identifying an array of competitive resource options with which to fill any resource need. Id. at 14, 17. Thus, the Department denied BECo's motion. Id. at 20.

The Department found that in order to promote consistency with the outcome of the Siting Council review, a slight modification was required for the implementation of RFP 3. Id. at 17-18. The Department sought to initiate an RFP with a supply block that ultimately would correspond with the findings of the Siting Council, yet without so much uncertainty as to receive only a minimal and meaningless response; therefore, the Department determined that the size of the supply block for RFP 3 initially should encompass a capacity range with minimum and maximum bounds. Id. at 18. Accordingly, in its August 16, 1991 Order in D.P.U. 90-270 initiating RFP 3, the Department set the size of the supply block at a maximum of 306 megawatt

("MW"),<sup>6</sup> the size of BECo's next planned supply addition (Edgar), and at a minimum of 132 MW, equal to five percent of BECo's annual peak load (a minimum solicitation level prescribed by 220 C.M.R. § 8.05(2)(b) of the QF regulations). Id. at 35. The Department further stated that it would later "issue an Order defining the size of the supply block between these minimum and maximum levels, subsequent to and consistent with the Siting Council's determination of need in EFSC 90-12/12A [the Edgar proceeding]." Id. at 35.

On January 13, 1992, the Siting Council staff issued a tentative decision in EFSC 90-12/12A (Phase I). In that tentative decision, it was found that BECo should plan for additional resource requirements of 121 MW in the year 1994 and 190 MW in the year 1995. On January 24, 1992, the Siting Council staff withdrew that tentative decision.

On January 27, 1992, the Department issued an Order setting the size of the supply block for BECo's RFP 3 at 132 MW, the minimum end of the range previously set. Boston Edison Company, D.P.U. 90-270-C at 4 (1992). The Department found

that further delay in setting the supply block for RFP 3 is inconsistent with the interests of BECo's ratepayers and the important regulatory objectives supporting independent and QF power production. The benefits of establishing certainty in this solicitation process outweigh any risk that the Siting Council may determine a resource need for BECo substantially in excess of the 132 MW supply block set in this Order.

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<sup>6</sup> In its initial RFP 3 filing, BECo proposed a supply block of 200 MW based on the addition of two hypothetical combustion turbine generating units. Boston Edison Company, D.P.U. 90-270, at 27-28 (1991). However, in its filing with the Siting Council in EFSC 90-12/12A, BECo contended that there was an identified resource need of 400 MW, to be met in part by the Company's proposed 306 MW Edgar facility. Id. at 15. For purposes of identifying the supply block and calculating the ceiling price schedules for RFP 3, the Department found that BECo's proposed Edgar facility should be treated as the next available unit. Id. at 32; see also 220 C.M.R. § 8.05(2)(b).

Id. at 3.

On April 10, 1992, the Siting Council issued a final decision. Boston Edison Company, EFSC 90-12/12A (Phase I) (1992) (see Section II.A., below). In that Decision, the Siting Council found that BECo "can be anticipated to experience a capacity surplus totaling 149 MW in 1996, and 120 MW in 1997." Id. at 170.

## II. RELATED PROCEEDINGS

### A. EFSC 90-12/12A

On May 1, 1990, the Company filed its Long-Range Integrated Resource Plan for the years 1990 through 2014 with the Siting Council for approval. On that date, the Company also filed a petition seeking the Siting Council's approval to construct, maintain, and operate a 306 MW natural gas/distillate oil-fired, combined cycle, electric generating station, referred to as the Edgar project.<sup>7</sup> Boston Edison Company, 24 DOMSC 125, 135 (1992). The proceeding was divided into two phases. Phase I involved: (1) an analysis of the Company's demand forecast, an examination of its projections of existing and planned resources, and the integration of those factors to assess the risks and costs of pursuing alternative levels of system reliability; (2) a determination of BECo's need for all resources; and (3) a determination of the adequacy of the Company's supply plan in the short run. Phase II was intended to address: (1) the adequacy of the Company's supply plan in the long run; (2) the least-cost nature of the

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<sup>7</sup> The Company also filed three petitions regarding the Edgar project for approval by the Department: a request for a zoning exemption for the proposed site (D.P.U. 90-106); a request for financing authorization for the establishment of a separate subsidiary to construct, own, and operate the Edgar facility (D.P.U. 90-117); and a request for preapproval of a power purchase agreement between BECo and its proposed subsidiary (D.P.U. 90-118).

Company's supply plan, including consideration of the Edgar project and other resource options available to meet any resource need identified in Phase I; (3) the Company's site selection process; and (4) the Edgar project, including the cost, environmental, and reliability impacts of the proposed facility at both the primary and alternative sites. Id. at 144, 145.

In its initial filing with the Siting Council, BECo identified a resource need of 400 MW in the year 1994 (EFSC 90-12/12A, Exh. BE-1, at A-5). During the course of the proceedings, BECo was required on two occasions, once in February 1991 and again in February 1992, to file a recalculation of its load forecast using updated inputs. 24 DOMSC 125, 137, 140 (1992). The Siting Council's decision in Phase I was based on the February 1992 updated forecast. 24 DOMSC 125, 302-303.

On April 10, 1992, the Siting Council issued its final decision in Phase I. Boston Edison Company, 24 DOMSC 125 (1992). In determining the level of resource need for BECo, the Siting Council found BECo "can be anticipated to experience a capacity surplus totalling 149 MW in 1996, and 120 MW in 1997." Id. at 303. Based on this finding, on

April 30, 1992, the Company announced that it would defer construction of its proposed Edgar facility (BECo Memorandum at 2).<sup>8</sup>

Subsequently, the Siting Council determined that the scope of Phase II would be limited to a so-called "site-banking" inquiry regarding Edgar. A Tentative Decision on BECo's "site-

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<sup>8</sup> On May 20, 1992, BECo filed with the Department motions to withdraw the Company's Edgar-related petitions in D.P.U. 90-106, D.P.U. 90-117, and D.P.U. 90-118. On July 15, 1992, the Department granted BECo's motions, pursuant to 220 C.M.R. § 1.04(4)(b).

banking" proposal was issued on February 26, 1993 by the staff of the Energy Facilities Siting Board ("Siting Board").<sup>9</sup>

#### B. RFP 3 Complaints

Five developers who submitted project proposals in RFP 3 each have filed separate complaints with the Department alleging various unreasonable actions by BECo in its treatment of their proposals.<sup>10</sup> Four complaints allege unreasonable actions in BECo's re-scoring of their project proposals: Concord Energy Corporation, D.P.U. 92-144; Williams/Newcorp Generating Company, D.P.U. 92-146; CMS Generation Company & Montvale Energy Associates, L.P., D.P.U. 92-166; and Bio Development Corporation, D.P.U. 92-167. One complaint alleges unreasonable actions by BECo's disqualification of its proposal: DLS Energy, Inc., D.P.U. 92-153. These complaints remain under review by the Department.

### III. STANDARD OF REVIEW

The Company's May 20, 1992 petition to the Department asks specifically that "consideration of the RFP 3 bids be deferred to the Company's IRM proceeding" (Petition at 3). However, it is clear from the Company's petition and accompanying memorandum that the

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<sup>9</sup> On September 1, 1992, the functions and responsibilities of the Siting Council were merged into the Department pursuant to a reorganization plan enacted as Chapter 141 of the Acts of 1992 ("Reorganization Act"). Pursuant to the Reorganization Act, proposals to construct facilities will be reviewed and decided by the newly created Siting Board. Reorganization Act, §§ 9, 15. Petitions for approval to construct facilities that were pending before the Siting Council prior to September 1, 1992 will be decided by the Siting Board. *Id.*, § 16.

<sup>10</sup> A sixth developer, West Lynn, filed a complaint alleging unreasonable actions by BECo's disqualification of its proposal; however, on May 19, 1993, West Lynn withdrew its complaint.

Company believes that RFP 3 should be terminated, as it is "plainly not in the public interest for the Company to proceed with an RFP 3 that is plainly out of date" (id. at 1).<sup>11</sup>

Accordingly, and because the Company's first IRM proceeding has been concluded without any resolution of RFP 3 issues, the Department addresses the Company's petition as a petition to terminate RFP 3 and applies the appropriate standard of review.

BECo's RFP 3 was approved by the Department and issued by the Company under the provisions of 220 C.M.R. §§ 8.00 et seq.<sup>12</sup> and consistent with the Department's Order in IRM Rulemaking, D.P.U. 89-239 (1990).<sup>13</sup> In seeking to terminate RFP 3, BECo requests an exception to specific requirements of 220 C.M.R. §§ 8.00 et seq., in addition to seeking an exception to the overall provisions of the Department's Orders in D.P.U. 90-270 requiring BECo to proceed with RFP 3.

BECo's RFP 3 has been approved by the Department, issued by the Company, and responded to by project sponsors. The project proposals submitted in RFP 3 have been ranked, and BECo has identified the Award Group. The next activity for BECo to perform to fulfill its

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<sup>11</sup> See also CONUG Memorandum at 3-4: "[T]he relief sought by the Company is not a 'deferral' of RFP 3, but is in fact the termination and cancellation of RFP 3."

<sup>12</sup> The regulations at 220 C.M.R. §§ 8.00 et seq. govern the sales of electricity by qualifying facilities ("QFs") to utilities.

<sup>13</sup> In D.P.U. 89-239, the Department issued its regulations governing the IRM process (220 C.M.R. §§ 10.00 et seq.), and established a policy for the issuance of utility RFPs for the purchase of electricity during the period of transition from the QF process to the IRM process. D.P.U. 89-239, at 86-92 (1990). In accordance with the Department's transition policy, BECo's RFP 3 included a solicitation of power from both QFs and independent power producers without utility ownership (referred to collectively as non-utility generators or NUGs). Id. at 90-91; Boston Edison Company, D.P.U. 90-270, at 21-26 (1991).

obligations under this solicitation process concerning RFP 3 is to negotiate and execute a contract with the Award Group.<sup>14</sup> The Department's regulations governing the completion of an RFP solicitation provide, in pertinent part, that

[o]n the basis of the Project Proposal rank developed in accordance with 220 C.M.R. § 8.05(5), the utility shall identify the Award Group. The utility will begin finalizing power purchase contracts with qualifying facilities whose Project Proposals are in the Award Group immediately after the Project Proposals have been ranked.

220 C.M.R. § 8.05(6)(a).

While the Department's regulations establish a comprehensive set of rules and standards for the solicitation of power from NUGs, "the Department may, where appropriate, grant an exception from any provisions of these regulations." 220 C.M.R. § 8.07(3). The regulations do not set any standard for determining where an exception is appropriate.

The Department has found that where the exception to the regulations would require a material change in an RFP that has been issued or a significant change in the RFP process once an RFP has been issued, the party requesting the exception must demonstrate the existence of "truly extraordinary circumstances" that would justify the exception. See Altresco Lynn, Inc. and Altresco Pittsfield, L.P./Commonwealth Electric Company and Cambridge Electric Light Company, D.P.U. 91-142/153, at 12 (1991) ("Altresco"); see also Boston Edison Company, D.P.U. 92-130-1, at 8 (1992). If the Department finds that a sufficient showing of "truly extraordinary circumstances" has been made, the Department then must determine the extent of

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<sup>14</sup> The solicitation process is considered complete when contracts with all Award Group qualifying facilities have been signed or when all eligible project offers have been exhausted. 220 C.M.R. § 8.05(6)(k).



the exception that is appropriate. To determine the extent of any exception to the regulations, the Department must balance the interests affected, including the public interest, and the interests of any affected parties. Boston Edison Company, D.P.U. 92-130-1, at 8 (1992).

#### IV. POSITIONS OF THE PARTIES

##### A. BECo

BECo contends that circumstances have changed dramatically since the Department issued its Order in D.P.U. 90-270 (BECo Petition at 1). BECo has identified these changes as (1) the economic recession, and (2) the Siting Council's determination in EFSC 90-12\12A (Phase I) regarding BECo's need for additional resources (id.). BECo states that as a result of these two factors, it decided to defer construction of its proposed Edgar project (id.).

BECo maintains that its forecast indicates that future power needs continue to decline (id.). BECo asserts that the Siting Council found that the economic changes during the pendency of EFSC 90-12/90-12A (Phase I) were so significant that BECo was required to file a reforecast of its demand growth, citing Boston Edison Company, EFSC 90-12/90-12A (Phase I) at 24 (1992) (BECo Memorandum at 6). BECo argues that the drop in the Massachusetts economy itself constitutes an extraordinary change in circumstances as set forth by the Department in Altresco, D.P.U. 91-142/153, at 12 (id.).

BECo also states that on April 10, 1992, the Siting Council formally determined that BECo has no need for additional resources until the end of the decade (id. at 2). BECo maintains that the Siting Council found a much lower need for power than the need that the Company had identified in its May 1990 filing with the Siting Council and on which the RFP 3 ceiling price was based (id.). BECo asserts that continuation of RFP 3 will result in enormous

waste of customer funds (id. at 3). BECo estimates that, based on a forecast representing an extrapolation of the Siting Council's need forecast, in the period from 1995 through 2000, an RFP 3 contract will inflate unnecessarily direct costs to customers by \$273 million (id., and Attachment 2). BECo also estimates that payments by BECo under an RFP 3 contract will exceed \$2 billion over the life of the contract (id.). BECo contends that given the Siting Council's finding that power is not needed, expenditures for power under RFP 3 would be premature (id. at 2). BECo argues that it is bad policy to make major expenditures with a significant rate impact when the option to wait and see how circumstances develop is available (id.).

BECo further states that, on April 30, 1992, the Company announced that it would defer construction of its proposed Edgar generating facility (id.). According to BECo, that decision was based on the Company's assessment of (1) the Siting Council's April 10, 1992 Decision and (2) the effect of the recession on the region's power needs (id.).

BECo asserts that based on all these developments, it is not in the public interest for the Company to proceed with an RFP that is completely out-of-date (BECo Petition at 3). BECo contends that RFP 3 is based on obsolete data that the Siting Council has rejected (BECo Memorandum at 2). BECo maintains that, under RFP 3, capacity payments would be made reflecting an erroneous assumption that the Company needs additional capacity in the year 1994 and that the Company is planning to build Edgar to meet that need (id.).

BECo also argues that continuation of RFP 3 would not be consistent with the goal of

PURPA<sup>15</sup> to increase efficiency and lower customer costs (BECo Petition at 2). BECo contends that protection of the NUG industry in the name of a "PURPA-preference" is unwarranted (id.). BECo asserts that in opposing the Company's petition, NUGs have confused protection from unfair competition with protection from market reality (BECo Response at 3). BECo maintains that NUGs are seeking "certainty" in the market, despite changes in the demand for power (id. at 4). BECo argues that while insulation from competition may have been appropriate when the NUG industry was in its infancy, it certainly is not appropriate now (id.).

BECo further argues it is not appropriate to apply to the RFP 3 proceeding the Department's findings in D.P.U. 92-92 regarding BECo's capacity need (BECo Supplemental Response at 5). BECo contends that (1) the parties to the two proceedings are not the same, (2) the issues are not the same, and (3) the Department's decision in D.P.U. 92-92 was not a decision on the merits of the Company's need in 1994 (id.). BECo states that in D.P.U. 92-92, the Department made a determination of a reasonable rate structure for the Company (id. at 6). According to BECo, the earliest date of capacity need is but one element of a marginal cost study, which itself is but one aspect supporting the rate structure (id.). BECo asserts that in this RFP 3 proceeding, the determination of BECo's need is an absolutely central issue (id.).

BECo contends that for the Company to have a need for 132 MW of RFP 3 power in 1994, the Company's load would have to grow at a rate of about 20 percent in 1993 (id. at 3). BECo bases this growth-rate assertion on (1) a capacity surplus in 1993 of 370 MW per EFSC 90-12/90-12A (Phase I), Table 7, and (2) BECo's recent IRM filing showing a surplus of 440

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<sup>15</sup> The Public Utility Regulatory Policies Act of 1978, as amended. 16 U.S.C. § 824a-3; 16 U.S.C. §§ 2601 et seq.

MW in 1993 (id.). BECo maintains that such growth rates never have occurred in healthy economic times, let alone in periods of stagnation (id.).

BECo also contends that its IRM Draft Initial Filing in D.P.U. 92-265 provides "compelling evidence" and more current analysis in support of the Company's request to terminate RFP 3 (id. at 7). According to BECo, in that IRM filing the Company projects no need for additional resources until the year 2002 (id. at 8).

B. CONUG/NECA/West Lynn<sup>16</sup>

These parties assert that BECo has failed to satisfy the high threshold standard established by the Department for suspension of an RFP process -- "truly extraordinary circumstances" (NECA Opposition at 5; CONUG Memorandum at 7). West Lynn asserts that BECo's alleged demand reforecast, which the Department expressly contemplated before issuing its Order in D.P.U. 90-270, cannot meet this standard (West Lynn Memorandum at 11). Among other things, West Lynn points out that the Siting Council included BECo's commitment to RFP 3 when considering BECo's future capacity needs (id.). CONUG contends that the changes in the Massachusetts economy and their effect on BECo's capacity needs are no more extraordinary than the circumstances alleged by Cambridge Electric Light Company and Commonwealth Electric Company (together "Cambridge/Commonwealth") in Altresco (CONUG Memorandum at 7). CONUG asserts that BECo's alleged capacity surplus is much smaller than the surplus alleged by Cambridge/Commonwealth in the Altresco case (id. at 8). CONUG further asserts

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<sup>16</sup> These parties are grouped here for convenience purposes only. While these parties have presented similar arguments in opposition to BECo's Petition, this grouping is not intended to indicate that these parties necessarily have the same interests.

that the supply block for the Cambridge/Commonwealth RFP in the Altresco case was almost 13 percent of the applicable peak load, while the supply block for BECo's RFP 3 is the minimum five percent of BECo's peak load (id.; see also West Lynn Memorandum at 12). CONUG states that in Altresco, the Department found that the economic downturn did not meet the standard of "truly extraordinary changes in circumstances" (CONUG Memorandum at 7, 16; see also NECA Opposition at 4).

NECA maintains that the Department has a long-articulated policy of maintaining a competitive market in energy production (NECA Response at 2; see also West Lynn Memorandum at 3). CONUG maintains that the clear and unambiguous intent of the Department's QF regulations is to foster and implement the mandate of PURPA and create a reliable procurement process that eliminates non-price barriers to "the development of non-utility alternatives for the cost-effective generation of electricity," citing Altresco at 11-12 (CONUG Memorandum at 2). CONUG contends that the need for a reasonable and predictable market environment for the procurement of non-utility resources has resulted in an unbroken string of Department precedent designed to ensure such an outcome (id. at 5). NECA asserts that suspension of RFP 3 would have a chilling effect on the development of cost-effective NUG alternatives (NECA Opposition at 4; see also CONUG Memorandum at 10). CONUG contends that the numerous developers that submitted proposals in response to RFP 3 acted in reliance on the Department's regulations and Orders that prescribed a minimum 132 MW supply block (CONUG Memorandum at 4). West Lynn maintains that if an RFP does not represent a commitment to purchase power until after a contract is signed, NUGs are at much greater risk than if RFPs represent real commitments when issued (West Lynn Memorandum at 18).

NECA contends that the Department's regulations at 220 C.M.R. §§ 8.00 et seq. make it clear that the competitive solicitation process is the primary mechanism for implementation of the dictates of PURPA in Massachusetts, and that electric companies are required to comply absent extraordinary circumstances justifying Department exemption (NECA Opposition at 3; see also CONUG Memorandum at 2; West Lynn Memorandum at 14). CONUG asserts that there is nothing in PURPA or in the regulations of the Federal Energy Regulatory Commission ("FERC") implementing PURPA that would support termination of RFP 3 (CONUG Memorandum at 12). CONUG states that FERC rules provide the individual states with the authority to implement the intent of PURPA and to determine an appropriate set of avoided costs, citing 18 C.F.R. § 292.401(a) (id. at 13). CONUG further cites the FERC regulations:

In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(id., citing 18 C.F.R. § 292.304(b)(5)).

NECA and CONUG maintain that the Department's regulations explicitly recognize that even in a case where an electric company projects no further need for capacity, the importance of maintaining a market in non-utility generation for the long-term benefit of ratepayers requires that an electric company offer to purchase some minimum level of energy from NUGs, citing 220 C.M.R. § 8.05(2)(b) (NECA Opposition at 3; CONUG Memorandum at 16). West Lynn asserts that the Department consistently has recognized that PURPA requires the Department to structure and enforce a solicitation process that allocates risk between developers and ratepayers (West Lynn Memorandum at 14). West Lynn contends that in this system, the risk of certain

changed circumstances, such as BECo's alleged reduced demand forecast, are borne by ratepayers (id.). West Lynn argues that the cancellation of RFP 3 would upset significantly the balance of risk and reward by removing from the process the certainty that a third-party supplier needs to justify participation in a solicitation process (id. at 14-15).

West Lynn states that non-utility developers are not asking ratepayers to protect or subsidize the NUG industry, rather they are advocating free and fair competition in the electric utility industry (id. at 18). CONUG maintains that enforcement of the Department's regulations is not a multi-million dollar subsidy for the NUG industry, but it is an action necessary to ensure the continued development of cost-effective resources needed to benefit the long-term requirements of ratepayers (CONUG Memorandum at 10). CONUG asserts that granting BECo's Petition would be perceived by non-utility developers as a significant retreat by the Department from its active role in encouraging the viability of a competitive generation market (id.; see also West Lynn Memorandum at 16-17).

West Lynn argues that BECo's calculation that the completion of RFP 3 will result in a excess costs to ratepayers of \$273 million by the year 2000 is derived from new, unexamined avoided costs (West Lynn Memorandum at 7). West Lynn states that BECo's calculation appears to be based on the assumptions that the RFP 3 winner is paid on the basis of the 1995 ceiling price, escalating at five percent per year, and that the project achieves a 95 percent dispatch rate (id.). West Lynn maintains that even assuming that payments under an RFP 3 contract are made at such an inflated level, BECo fails to note that these costs are more than offset during the subsequent three-year period by savings that result from the completion of RFP 3 (id.). West Lynn further contends that BECo's estimate of costs beyond this point assumes

the addition of generation sources that are, as yet, unlicensed and therefore speculative in nature (id.). West Lynn further argues that BECo does not account for, or even acknowledge, the environmental benefit that would flow from "backing off" older oil-fired utility units and replacing them with new, cleaner power sources (id. at 6).

CONUG further argues that in D.P.U. 92-92, the Department ruled conclusively and adversely on the factual predicate underlying BECo's request to terminate RFP 3 (CONUG Supplemental Memorandum at 5). CONUG maintains that consistent with BECo's own planning assumptions, the Department determined that the Company's present capacity need is in the year 1994 (id.). CONUG states that the entire predicate of BECo's case in this RFP 3 proceeding hinges on its claim of not needing new capacity until the end of the decade (id.). CONUG asserts this since the Department now has made contrary factual findings regarding BECo's capacity need, the Department's regulations and precedent require BECo to execute a contract with the RFP 3 Award Group (id. at 5-6).

Regarding BECo's reliance on its IRM filing as evidence of surplus capacity through the end of this decade, CONUG maintains that the projections in BECo's IRM filing are untested and appear to contain insupportable assumptions (CONUG Supplemental Reply at 2-3).

### C. Attorney General

The Attorney General contends that the policy underlying Massachusetts and federal law regarding resource procurement is to reduce ratepayer costs below electric companies' avoided costs in the long run, by encouraging the development of NUGs (Attorney General Response at



2).<sup>17</sup> He further contends that this policy is implemented by such means as the establishment of a reliable and competitive marketplace and the payment of front-loaded long-run prices to NUGs (id.).

The Attorney General asserts that the current deep recession constitutes extraordinary circumstances, and would warrant a departure from existing rules (id. at 2-3). The Attorney General argues that the underlying objective of least-cost resource procurement would be most clearly served by "rebidding" RFP 3 using the Company's updated avoided costs (id. at 4).

#### D. The Energy Consortium

The Energy Consortium contends that the Department should review the viability of all resources (including NUGs and demand-side management) on a competitive basis in BECo's IRM proceeding (Energy Consortium Response at 2).<sup>18</sup> The Energy Consortium asserts that in this case there are clear issues of material fact that can be reconciled only in evidentiary hearings (id. at 3).

#### V. ANALYSIS AND FINDINGS

The Company's May 20, 1992 petition requested that the Department permit BECo to postpone resolution of RFP 3 to its first IRM proceeding (Petition at 1). On March 10, 1993, BECo and other parties to the Company's first IRM proceeding submitted a proposed agreement resolving issues in that proceeding. The proposed settlement, however, provided no resolution as to the dispute surrounding RFP 3. Boston Edison Company, D.P.U. 92-265 (1993). With

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<sup>17</sup> The Attorney General's Response was filed with his notice of intervention.

<sup>18</sup> The Energy Consortium's Response was filed with its petition for leave to intervene.

the Department's April 28, 1993 approval of the settlement agreement in D.P.U. 92-265, it becomes necessary to effect a separate resolution of RFP 3.<sup>19</sup>

As set forth in Section III, above, pursuant to the standard established by the Department for suspension of an RFP process, the Department must find that "truly extraordinary circumstances" have arisen since the Department issued its Order approving RFP 3 that would justify granting an exception to the QF regulations for BECo to terminate any further activities in RFP 3. Altresco at 12 (1991). The Department must make this finding based on information available as of the Company's May 20, 1992 petition in this docket.

The issue before the Department at this time is whether to require the Company to proceed with RFP 3 and to negotiate with the RFP 3 Award Group, or to terminate RFP 3 based on representations by the Company that, since the Department's August 16, 1991 Order in D.P.U. 90-270, circumstances have changed significantly such that continuation of RFP 3 would be contrary to the public interest. BECo has identified these changed circumstances as (1) the continued economic decline, and (2) the Siting Council's determination in EFSC 90-12/12A (Phase I) regarding the Company's need for additional resources. As a preliminary matter, the Department finds that these two factors presented by BECo as grounds for terminating RFP 3 ultimately represent the same issue -- whether, because of a decline in the economy or otherwise, it can be concluded from the information available to the Department that BECo has

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<sup>19</sup> As stated in Section III, above, the Department has determined that BECo's request to "postpone" further activities in its RFP 3 is examined appropriately in this Order as a request to terminate RFP 3 without further obligation by BECo.

no need for the additional capacity that would be available from contracts executed under RFP 3.<sup>20</sup>

In assessing whether a lack of need for additional capacity might justify terminating RFP 3, the Department notes that many of the issues raised in this case already have been addressed by the Department in D.P.U. 90-270, its Order initiating RFP 3. In reaching its initial decision to proceed with the implementation of RFP 3 in D.P.U. 90-270, the Department began by noting that

This RFP proceeding presents unusual circumstances to the Department: it occurs during the transition period between issuance and implementation of the new IRM regulations; it occurs while the Company's resource plan and proposed supply addition are under review before the Siting Council; it occurs at a time when significant changes in the economy create uncertainty regarding the Company's forecasts of load and need.

D.P.U. 90-270, at 17.

Clearly, the Department's decision in D.P.U. 90-270 to proceed with RFP 3 was a result of careful consideration of the need for additional resources, based on the information that was available at that time. In fact, the Department's decision in D.P.U. 90-270 required it to consider and reconcile a significant amount of data submitted by the Company in different regulatory arenas -- data from which the Company drew inconsistent conclusions. For example, in support of its October 15, 1990 RFP 3 filings to the Department, the Company proposed to meet a 200 MW supply block beginning in 1997. Id. at 28. At the same time, the Company

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<sup>20</sup> The Department notes that BECo has failed to present any independent reasons for terminating RFP 3 based on a "continued economic decline" other than the effect that such a decline might have on the Company's need for additional capacity.

was before the Siting Council with its May 1, 1990 long-range integrated resource plan that identified a resource need of 400 MW in the year 1994, under the Company's planning recommendation to build to meet an 80 percent confidence level.<sup>21,22</sup> Id. at 15.

In evaluating BECo's need for additional resources, the Department also considered need calculations submitted by the Company on June 3, 1991, in light of the Company's revised load forecast in EFSC 90-12/12A (Phase I). The Department concluded that, based on that information, the Company's need for additional resources would exceed 100 MW in the year 1994. Id. at 34.

In response to the "unusual circumstances" relating to BECo's RFP 3 proceeding, as cited by the Department in D.P.U. 90-270 and noted above, the Department found it appropriate and necessary to modify slightly the QF solicitation process for BECo's RFP 3. Thus, the Department determined to set an initial range for the Company's supply block. The lower end of the range was set at 132 MW, or five percent of BECo's annual peak load consistent with the

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<sup>21</sup> We distinguish the need value associated with the Company's proposal to meet an 80 percent confidence level from the other need values presented herein, which typically reflect the Company's "base" case calculations and are closer to a 50 percent confidence level.

<sup>22</sup> RFP 3 has remained unresolved, at least in part, because of the Company's decision to seek approval of a power purchase contract for its own 306 MW project, Edgar, while simultaneously seeking to limit itself to a 200 MW procurement from the competitive market at a later date. As an aside, we note that while the Company suggests in its Memorandum (at 5) that there is no longer any need for regulators to act to ensure a competitive balance between utility and NUG projects, the Department finds that the public interest will continue to require some regulatory oversight of the procurement of generation to preserve fair opportunities among all potential resource providers.

Department's QF regulations at 220 C.M.R. § 8.05(2)(b), while the upper end of the range was set at 306 MW, the size of BECo's next planned addition, Edgar. The Department determined that once the Siting Council made its finding regarding the Company's need for additional resources in EFSC 90-12/12A (Phase I), the Department would establish a specific supply block for RFP 3. Id. at 34. The Department also indicated that this approach to setting the supply block would permit it to achieve a degree of consistency with the level of need to be determined by the Siting Council in EFSC 90-12/12A (Phase I). Id. at 33.

In deciding to proceed with RFP 3, the Department recognized the risks that a delay in implementing RFP 3 could impose on ratepayers, and also indicated its concern that developers might not respond to the RFP 3 without reasonable assurance that a purchase ultimately would be made by BECo. The Department stated,

Through our determination of the supply block in this Order, we have struck a reasonable balance between providing safeguards for ratepayers against the risk of purchasing excess capacity and providing sufficient assurance to potential bidders in BECo's RFP 3 that a meaningful increment of supply will in fact be accepted through the solicitation.

Id. at 20.

The Department concluded that "any further delay in BECo's RFP 3 would conflict with the legitimate interests of ratepayers and contravene the objectives of both PURPA and the Department's regulations." Id. The Department has recognized that regulation is an evolving process and emphasizes that utility decisions and activities regarding resource procurement cannot be put on hold as regulatory frameworks develop.<sup>23</sup> See D.P.U. 89-239, at 91-92. The

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<sup>23</sup> The Department cannot continue to address significant resource procurement issues  
(continued...)

Department's conclusion in D.P.U. 90-270 reflects our continuing conviction that it is through competition in the electric generation market that ratepayers will receive the benefits of least-cost investments with reduced regulatory oversight. In pursuit of this objective and recognizing the importance of stability in regulatory processes, the Department provided assurances in the Order initiating RFP 3 that at least 132 MW would be purchased from NUG developers. The substantial response to BECo's RFP 3 reveals that developers accepted the Department's Order to the Company in good faith. The Department will not now reverse its decision to implement BECo's RFP 3.

Importantly, the Department's decision to go forward with RFP 3 was made in light of the changing economic circumstances identified by the Company in its Petition. The Department's Order in D.P.U. 90-270 explicitly provided for the possibility of a finding by the Siting Council that the Company had no need for additional resources. As stated above, in initially establishing the range of the supply block for RFP 3, the Department applied the requirement that, at a minimum, the supply block must be five percent of BECo's peak load. D.P.U. 90-270, at 34; 220 C.M.R. § 8.05(2)(b). Consistent with this requirement and in consideration of the other factors addressed by the Department in D.P.U. 90-270, the Department indicated that "should the Siting Council find no need for BECo to bring any additional supply into service within the next 20 years, the supply block shall equal five percent

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<sup>23</sup>(...continued)

through regulatory waivers and other ad hoc mechanisms. The Department's ongoing interest in developing a resource procurement framework that better serves the needs of ratepayers and utilities is addressed more appropriately through more regularized and comprehensive proceedings.

of the utility's current annual peak load, as required by the Department's QF regulations."

D.P.U. 90-270, at 36.

Because the Department anticipated and determined what course should be followed if the Siting Council were to find that the Company has no need for additional resources, the Department is hard pressed now to accept a finding of no need by the Siting Council as constituting truly extraordinary circumstances that would justify terminating RFP 3.<sup>24,25</sup> Therefore, the Department finds that the Company has failed to demonstrate the existence of extraordinary circumstances that would justify terminating RFP 3.<sup>26</sup>

The Department further finds that it is not appropriate to reopen this case. We note that 49 days of hearings and two revisions to BECo's demand forecast preceded the Siting Council's Decision on need in EFSC 90-12/12A (Phase I). Because of the substantial adjudication (and related costs to participants and the Department) that may be required to determine BECo's current need for additional capacity and because of the need for finality in this decision process, the Department finds that adjudicating at this time BECo's need and the other related issues

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<sup>24</sup> Notwithstanding the fact that the Department anticipated a finding of no need by the Siting Council and that such finding cannot now be considered as constituting "truly extraordinary circumstances," the Company has not convinced us that it has experienced a change in need for additional resources that constitutes "truly extraordinary circumstances."

<sup>25</sup> Because the Department stated explicitly in D.P.U. 90-270 what would be required if the Siting Council were to find that the Company did not have a need for additional resources, the Company properly should have moved to reconsider or appealed the Department's Order in D.P.U. 90-270-C, wherein the RFP 3 supply block was set at the minimum 132 MW.

<sup>26</sup> Since the Department hereby denies BECo's Petition, we find that CONUG's Motion to Dismiss and Motion for Summary Judgment are moot and we make no express ruling on those motion.

raised by the Company in its Motion to Reopen the Record would be contrary to the public interest. Therefore, the Company's Motion to Reopen the Record is denied.

Accordingly, the Company is hereby directed to resume activities in its RFP 3, consistent with the requirements of 220 C.M.R. §§ 8.00 et seq.

While our directive to proceed with RFP 3 at this time is based entirely on consideration of matters set forth above, two aspects of the Company's Petition merit further discussion. First, the Department observes that the Siting Council's need findings in EFSC 90-12/12A (Phase I) and the factors leading to those findings may be interpreted in a number of ways. A careful examination of that Decision and the underlying record discloses that the capacity surplus amounts identified by the Siting Council for the years 1996 and 1997 would have to be adjusted for the purpose of determining whether a need exists for the capacity that would result from RFP 3.

The Siting Council's Decision on April 10, 1992 presented the results of calculations indicating that the Company would have a capacity surplus of 149 MW and 120 MW in the years 1996 and 1997, respectively. EFSC 90-12/12A (Phase I) at 169. However, the Siting Council's calculations included an anticipated 75 MW contribution from RFP 3 (i.e., the 132 MW RFP 3 supply block discounted by a 57 percent success rate). Id. at 160. Moreover, the Siting Council's Decision specifically indicated that the need findings for the years 1996 and 1997 did not reflect changes in anticipated MW contributions associated with new information on the Company's load management programs, as presented by BECo to the Siting Council in a March 12, 1992 record update. Id. at 11. In its March 12, 1992 filing to the Siting Council, as well as in related filings to the Department in Boston Edison Company, D.P.U. 91-233,



BECo indicated that cutbacks in the Company's load management programs were expected to reduce the MW contributions from those programs by over 200 MW.<sup>27</sup> See Exh. BE-121, Table 2 in EFSC 90-12/12A; see also D.P.U. 91-233, "DSM Settlement Agreement" Exhibit III, at 3.

The Department observes that if the Siting Council's need findings were adjusted to reflect the 75 MW contribution from RFP 3 and the 200 MW reduction in load management programs that the Company announced and has since implemented, a substantial capacity deficiency, both in 1996 and 1997, would result. While the Department makes no findings here on BECo's need for additional resources at the time the Siting Council's Decision was issued, consideration of this information does raise doubt regarding the Company's claim that the capacity available from RFP 3 would not be needed.

In directing BECo to proceed with RFP 3, we also emphasize that we make no findings concerning the Company's current need for additional capacity, which would require consideration of information beyond that which the Department may appropriately take into account in reaching its decision in this matter.<sup>28,29</sup> The Department observes that the factors that

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<sup>27</sup> In Boston Edison Company, D.P.U. 91-233 (1992), the Department reviewed and approved, pursuant to a settlement agreement, funding for BECo's conservation and load management programs for the years 1992, 1993, and 1994. This settlement reflected a reduction in excess of 200 MW in BECo's load management programs.

<sup>28</sup> We also note that evidence presented by the Company to the Department in its last rate proceeding suggested that the Company's first year of need would be 1994. Boston Edison Company, D.P.U. 92-92, at 27, n.11 (1993). BECo argues against using the information that it provided to the Department in that proceeding because that proceeding's focus was not a need determination. While we do not rely on the information submitted in D.P.U. 92-92 to reach our decision in the instant proceeding, the Department emphasizes that (1) a company's calculation of its need for additional resources may be an important element in more than one Department (continued...)

affect an electric company's need calculations are in constant flux. If the Department were to require continuous adjustments to demand forecasts and resource need calculations every time new data were available, the review of resource procurement processes conceivably would be endless. Accordingly, the Department's regulations for both utility projects (see 220 C.M.R. §§ 9.00 et seq.) and NUG projects (see 220 C.M.R. §§ 8.00 et seq.) reflect the fact that at some point, it becomes necessary to make a final decision on the need for new resources.

The second matter that we address pertains to the Company's assertion that RFP 3 is based on "obsolete data" and may result in \$273 million in unnecessary costs to customers. The \$273 million that the Company indicates would represent excess costs to its customers cannot be relied on as a basis for any findings in this Order because neither the Department

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<sup>28</sup>(...continued)

proceeding, each with different objectives; (2) consistency is required in the presentation of information by a company from one proceeding to the next; and (3) if the need calculation in D.P.U. 92-92 is inaccurate, it is so only to the extent that BECo failed to present accurate information to the Department in response to a specific request founded on important findings in EFSC 90-12/12A (Phase I).

<sup>29</sup> The Company's December 2, 1992 Draft Initial Filing in its first IRM proceeding (D.P.U. 92-265) indicated that, not counting any contribution from RFP 3 projects, the Company would not have a resource deficiency until the year 2002. However, BECo's IRM proceeding was settled without addressing the issue of the Company's need for additional resources. Since that issue was not adjudicated, there was no examination of the methodologies, data, and assumptions behind that need projection, such as (1) the MW contribution from existing resources, which was based on an availability forecast methodology that was rejected by the Siting Council in EFSC 90-12/12A, and (2) the MW contribution from conservation and load management programs, which were included at a constant level, regardless of the level that might be cost-effective.

nor the parties to the proceeding have had opportunity to explore the data and assumptions behind that calculation.

The Department does note that (1) in keeping with the requirements of the Department's regulations and the federal regulations implementing PURPA, the costs of any RFP 3 project were required to be below the Company's avoided costs at the time that RFP 3 was approved (220 C.M.R. §§ 8.05(2) and (3); 16 C.F.R. § 292.304(a)(2)); and (2) the substantial response to RFP 3 indicates that the solicitation was highly competitive. These factors can be expected to ensure that any project in the RFP 3 Award Group represented a least-cost resource alternative at the time. As noted above, the Department's decision in D.P.U. 90-270 to proceed with RFP 3 involved a balancing of the risks that then confronted ratepayers; because the Company has presented little documentation or support for the \$273 million figure, we are not now persuaded that the costs of RFP 3 will exceed its benefits to ratepayers.<sup>30</sup>

As a final matter, as indicated above, the Department currently is reviewing five petitions filed by RFP 3 project sponsors that seek to require the Company re-qualify or rescore their bids. Since the resolution of these petitions may affect the determination of the RFP 3 Award Group, the Department does not expect BECo to file any contracts for the purchase of power under RFP 3 until after the Department issues orders in these other proceedings. In accordance with the stay issued by the Department in D.P.U. 90-130-2 (1992), however, contract

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<sup>30</sup> We note that the \$2 billion, allegedly representing the annual payments required by RFP 3 over the life of the contract, as presented in the Dissenting Opinion, cannot be considered in this decision because neither the Department nor the other parties have had opportunity to explore the data and assumptions behind its calculation.

negotiations with the RFP 3 Award Group as currently constituted must begin within seven days of the date of this Order. The Department reminds BECo that it remains the Company's responsibility to take all prudent measures, consistent with the requirements of 220 C.M.R. §§ 8.00 et seq., to ensure that any contract submitted to the Department for approval is in the best interests of the Company's ratepayers.

VI. ORDER

Accordingly, after due consideration, it is

ORDERED: That the petition of Boston Edison Company filed with the Department on May 20, 1992 be and hereby is DENIED, and it is

FURTHER ORDERED: That Boston Edison Company shall resume activities in its RFP 3, consistent with the requirements of 220 C.M.R. §§ 8.00 et seq.; and it is

FURTHER ORDERED: That the motion to dismiss and the motion for summary judgment filed by the Coalition of Non-Utility Generators on May 27, 1992 be and hereby are dismissed as moot; and it is

FURTHER ORDERED: That the motion to reopen the record filed by Boston Edison Company on June 25, 1993 be and hereby is DENIED.

By Order of the Department,

## VII. DISSENTING OPINION OF COMMISSIONER MARY CLARK WEBSTER

The Order written by the majority has found that truly extraordinary circumstances do not exist in this case and, accordingly, BECo must contract to purchase 132 MW of capacity when no finding of resource need has been made. This minority opinion dissents from that finding, as well as the majority's decision to deny BECo's June 25, 1993 Motion to Reopen the Record.

Three factors render the circumstances of this case extraordinary: (1) the record in this case supports no finding of resource need for any new capacity; (2) the record in this case shows that, notwithstanding the issue of need, this proposed purchase is not least-cost; and (3) since BECo filed its RFP with the Department on October 15, 1990, the economic climate of BECo's service territory -- especially considering the well-known and current capacity glut throughout New England -- cannot support the finding that an additional 132 MW of capacity will serve the public interest. One is hard-pressed to find more compelling economic realities as a basis to revisit a Department decision.

There are two other points worth noting. The Department should not be promoting competition for competition's sake; rather the Department should focus on promotion of desirable policy objectives, such as the benefits that competition can bring. The RFP process was formed to promote least-cost planning. If the process fails to fulfill its policy objectives, the process, not the policy, ought to be abandoned.

Lastly, common sense suggests that regulators ought to keep in mind their responsibility to ratepayers. The process of ordering BECo to purchase a substantial and unnecessary power must not overshadow the substantive concerns of unnecessary cost, which

is estimated in this case to be between \$273,000,000 and \$2,000,000,000.

Mary Clark Webster  
Commissioner